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IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

RICHARD M. NIXON,

Petitioner,

v.

A. ERNEST FITZGERALD,

Respondent.

BRYCE N. HARLOW and
ALEXANDER P. BUTTERFIELD,

Petitioners,

v.

A. ERNEST FITZGERALD,

Respondent.

On Writ of Certiorari to the
United States Court of Appeals
for the District of Columbia Circuit

MOTION OF JUDITH CLARK, DANA BIBERMAN, NATALEE ROSENSTEIN, EVE ROSAHN AND JANE SPIELMAN TO INTERVENE AND FOR OTHER RELIEF

(For appearances, please see reverse side of cover.)

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Preliminary Statement

Judith Clark, Dana Biberman, Natalee Rosenstein, Eve Rosahn and Jane Spielman (hereinafter "Clark plaintiffs"), plaintiffs in Judith Clark, et al. v. United States of America, Richard Nixon, et al., 78 Civ. 2244 (S.D.N.Y.) (Lasker, J.), respectfully move the Court for leave to intervene and other relief in the instant case. The Clark plaintiffs have a compelling interest in the instant matter that is not or cannot be represented by either petitioners or respondent.

As is more fully set forth below, the interest of the Clark plaintiffs in the instant matter warrants a grant of

leave to intervene. First and foremost, it is the Clark plaintiffs' contention that the failure of the parties hereto to advise this Court of the settlement reached, constitutes a fraud, and, for this reason alone, the writ should be dismissed as improvidently granted. Second, the issues before the Court are moot and fail to come within the parameters of a "case and controversy" as defined by Article III of the U.S. Constitution.

Background

Clark v. U.S.A. arises from illegal and unconstitutional counter-intelligence programs carried out by agencies and officials of the United States government (hereinafter "COINTELPRO"). Extensive documentation has already been provided concerning the scope of COINTELPRO by the Senate Select Committee on Intelligence

Activities ("Church Committee"), grand jury investigations, criminal trials of two of the defendants in Clark, and reports in the media.

As some of the victims of COINTELPRO activities, the Clark plaintiffs' homes were burglarized, their telephones tapped and they were targets of assaults, kidnap plots and extensive surveillance and harassment. All such activities, as alleged in the Clark action, were carried out by employees and officials of the United States government under the direction of the highest government officials, and, as is particularly pertinent to this motion, then President Richard Nixon.

The aforesaid investigations and documentation have revealed that hundreds of government officials were involved in the authorization, effectuation and subsequent cover-up of the acts committed

against the Clark plaintiffs. Four officials of the Federal Bureau of Investigation (all defendants in Clark) were indicted by Federal grand juries for acts directed against the Clark plaintiffs (United States v. L. Patrick Gray, et al., D.D.C., 78-000179; United States v. Kearney, S.D.N.Y., 77 Crim. 0245). Former F.B.I. Assistant Director W. Mark Felt and Associate Director Edward S. Miller were, in fact, convicted, although subsequently pardoned by President Reagan.

Nixon, as a defendant in Clark, is charged with actively approving and directing a program of criminal and unconstitutional activities against the Clark plaintiffs and others.

In the more than three years since Clark has been pending, Nixon has made every effort to avoid defending himself on the merits. He first moved in the

District Court to dismiss the action as to him on the ground of absolute Presidential immunity. His motion was denied by the Hon. Morris E. Lasker, who, ruled, inter alia, that

> "Considering together the Scheuer holding that the highest official of the state is only qualifiedly immune from suit, and the Butz ruling that state and federal officials are to be treated alike for purposes of immunity, it follows necessarily that the highest official of the United States ordinarily enjoys a qualified immunity only.
>
> ...
>
> Whichever may be the proper construction the conclusion that Nixon is not absolutely immune in this case is the same.

481 F.Supp. 1086, 1091 (S.D.N.Y., 1979).

Despite the District Court's rejection of Nixon's claim of absolute immunity, and his key role in the conspiracy against the plaintiffs, the Clark plaintiffs have two years later, still been unable to proceed against Nixon. First, all proceedings against him were stayed

during the pendency of his motion to dismiss. After the denial of this motion, he filed a Notice of Appeal to the United States Court of Appeals for the Second Circuit.

Prior to his appeal being briefed or argued, Nixon moved the Second Circuit to stay its determination of his appeal, solely upon the basis of the pendency of his petition for certiorari, filed before this Court in Kissinger v. Halperin, 606 F.2d 1192 (D.C.Cir., 1979), aff'd. No. 79-880 (June 22, 1981). In an order dated March 11, 1980, the Second Circuit denied Nixon's motion for a stay with leave to renew should this Court grant certiorari in Kissinger v. Halperin. The Second Circuit heard the Nixon appeal in Clark on May 28, 1980 and reserved decision. Nixon thereafter renewed his motion for a stay, this Court having granted certiorari in Kissinger v.

Halperin, supra. As a result, the Second Circuit granted Nixon's application for a stay of its determination 624 F.2d 3 (1980).

Nixon then moved the District Court to stay all proceedings against him pending this Court's determination of Kissinger. In an order dated January 6, 1981, Judge Lasker granted the stay, further delaying the Clark plaintiffs' ability to proceed against Nixon in any fashion or in any forum.

Despite this Court's affirmance of the lower court's rejection of Nixon's claim of absolute immunity, Nixon has utilized subsequent determinations of this Court to further delay his responsibility to answer the allegations in Clark. Thus, when this Court granted certiorari in the instant action, Nixon once again moved the Second Circuit for continuation of the stay of its determination of his

appeal in Clark, claiming that Fitzgerald --no longer Kissinger--would be dispositive of his appeal in Clark. Nixon asserted this position despite the fact that by this Court's determinations in Kissinger and Smith v. Nixon, 50 U.S.L.W. (June 29, 1981), he is now required to be an active litigant in two separate actions.

As a result of the foregoing, all proceedings against Nixon in Clark have been stayed for the entire duration of Clark's pendency. Having lost in every court in which he has raised the claim of absolute immunity, Nixon now seeks this Court's consideration in the instant action. In light of the fraud the parties in this action have apparently sought to foist upon this Court as a result of their prior settlement, the proposal of petitioners' Harlow and Butterfield that the instant action

warrants the "formulation of a comprehensive immunity test," and the Clark plaintiffs' direct interest, they seek leave to intervene.

ARGUMENT

Point I - The Clark Plaintiffs Should Be Permitted to Intervene

Federal law has permitted intervention before this Court by parties who, while being affected by a Court's determination of a pending case, will not have their interest represented by the litigants before the Court. Certainly such is the case where there is a common question of law or fact. F.R.C.P. Rule 24(b)(2). The interests of justice demand that such intervention is appropriate if the interests of the intervenor are at stake. United States v. Paramount Pictures, Inc., 334 U.S. 131 (1948); United States v. Terminal Railroad Asso-

ciation, 236 U.S. 194 (1915).

The Clark litigation is directly tied to the matter before this Court. Despite the rejection of Nixon's claim of absolute immunity in the District Court, the Clark plaintiffs are prevented from prosecuting their action against Nixon because of the pendency of the instant case.

Moreover, despite the significant differences in the allegations against Nixon in Clark and Fitzgerald, the Clark plaintiffs may be bound by any decision of this Court on the issue of absolute immunity in Fitzgerald. It is of more than passing interest, in this regard, that petitioners Harlow and Butterfield in response to the Halperin motion to intervene, apparently plan to argue that this Court should utilize Fitzgerald as the vehicle for a "formulation of a comprehensive immunity test." Certainly,

regardless of outcome, the Clark plaintiffs are entitled to be heard on such an issue of such fundamental impact upon their action and, accordingly, are entitled to the relief herein sought.

Point II - The Instant Matter Has a Direct Impact Upon Clark v. U.S.A.

The Clark plaintiffs have a compelling interest in the outcome of Fitzgerald, yet their interests are not represented by either party. The facts in Clark and the constitutional issues raised by it are fundamentally at odds with those in Fitzgerald. In Clark, Nixon is a central figure in a conspiracy to deprive the plaintiffs of their constitutional rights for a period in excess of ten years, not merely a witness to wrongdoing or even a participant in an isolated act against one individual. In Fitzgerald, Nixon's role has been described as tangential and

routine:

> "Here [Nixon v. Fitzgerald], eight years of exhaustive litigation have been spawned by an ordinary personnel decision, the kind of matter that routinely comes to the attention of Presidents and their senior advisers on a daily basis. If this case can go to trial, so too can hundreds of others which may be brought by persons aggrieved by decisions in which a President and his highest aides might have played some tangential role.

Petitioners' Harlow and Butterfield's Response to the Halperin Motion to Intervene (Emphasis supplied).

By contrast, in Clark, Nixon's role is hardly tangential or routine. Rather, he is alleged to have committed serious violations of constitutional, statutory and common law rights of the plaintiffs, in addition to utilizing his position to formulate, promote and direct other high government and F.B.I. officials to commit egregious and unlawful actions against the plaintiffs. The facts under-

lying Clark go far beyond actions that Nixon may have taken as an individual while he was President. Rather, they directly address and call into question the parameters of the powers of the presidency itself: May a President utilize his high office and powers to commit illegal acts, cover them up and then thwart any action against him for such conduct, relying solely upon a claim of presidential immunity?

Fitzgerald raises none of the questions briefly discussed above. The issue in Fitzgerald (indeed if any issue still remains) is whether Nixon is to be held liable for his role in firing Fitzgerald, and does not address the powers of the presidency or a president's participation in an illegal and unconstitutional conspiracy of massive proportion. Yet, the outcome of Fitzgerald may well determine such fundamental questions for

the plaintiffs in Clark and anyone else similarly aggrieved who seeks to redress legitimate grievances against the highest government officials. It is plainly not sufficient to assert, as do all parties in Fitzgerald in their responses to the Halperin motion, that the Clark plaintiffs might later attempt to distinguish their action should Nixon prevail in Fitzgerald. The mere fact that this Court is now hearing this case has allowed Nixon to continue to circumvent the law and use the federal courts for his own purposes. As discussed above, the Clark plaintiffs have been at all levels attempting to vigorously litigate their action against Nixon for more than three years. Despite the fact that Nixon lost his motion to dismiss in Clark in the District Court and lost his motion for summary judgment in Halperin in every Court, including this Court, he has been able to avoid all

aspects of this litigation, including the crucial one of discovery. The Supreme Court's grant of certiorari in Fitzgerald has once again given new life to Nixon's use of the courts to avoid litigation.

Such dilatory tactics have already had a markedly adverse impact on the Clark plaintiffs. The inability to move forward with discovery against a central figure like defendant Nixon is extremely damaging to the plaintiffs. In addition, the impact of this Court hearing Fitzgerald should be viewed along with other changing conditions, including the Presidential pardon of Mark Felt and Edward Miller (two other key defendants in Clark), the imminent issuing of new Executive Orders redefining the powers of the intelligence agencies and the expected repeal of the Freedom of Information Act, which make the litigation in Clark more and more difficult. If this

Court stands by its granting of certiorari in Fitzgerald, it may well be years before the Clark plaintiffs can proceed with their case against Nixon. At best, this constitutes an undue hardship on the Clark plaintiffs and, at worst, a grave miscarriage of justice.

A ruling for Nixon in Fitzgerald would mean that despite years of litigation and despite volumes of evidence from congressional investigations, Nixon would never have been held accountable for any of his violations of the Constitution and laws while acting as President of the United States. Furthermore, such a ruling would be a signal to the sitting President and other high government officials that they may proceed with any action, no matter how illegal or unconstitutional, without fear of civil litigation.

Point III - The Instant Matter Presents No Justicable Case and Controversy

This Court has repeatedly ruled that there must be an active dispute for the Court to adjudicate the issues before it. A matter must be a justicable case and controversy within the meaning of Article III of the U.S. Constitution in order for this Court to have jurisdiction.

It is well settled that it is not the province of this Court to issue advisory opinions or to adjudicate political questions or abstract questions of law. Muskrat v. United States, 219 U.S. 346 (1911); Luther v. Borden, 48 U.S. (How.) I(1839); Powell v. McCormack, 395 U.S. 486 (1969). The principles enunciated by the Court must be able to be implemented in the matter before the Court. Local No. 8-6, Oil, Chemical and Atomic Workers Intern. Union, AFL-CIO v. Missouri, 361 U.S. 363 (1960).

There is no such case and controversy before the Court in the instant matter. Fitzgerald and Nixon, as demonstrated by their settlement, have already determined the claims which were previously disputed. The terms of their "Agreement" state, inter alia, that:

> "All payments to Plaintiff Fitzgerald required of Defendant Nixon under the terms of this agreement are in consideration of the dismissal of Plaintiff's claims for alleged violation of his constitutional rights..."

(Emphasis supplied).

An essential element of the case and controversy requirement is that there must be a live dispute at the time that this Court considers the issues. A case will be moot if the controversy is no longer applicable because of intervening circumstances. Thus, in DeFunis v. Odegaard, 416 U.S. 312 (1974), the plaintiff's admission to law school and impending graduation, made moot any

claims that his rights had been violated.

Where the parties have settled their claims, no live case and controversy exists. The Clark plaintiffs will argue that the instant case is moot, and the writ must be dismissed as improvidently granted.

More than failing to present a justicable case and controversy, the instant case is before this Court as a result of a deliberate fraud. The parties, and in particular Nixon and Fitzgerald, misled the Court by failing to advise and actually denying that a settlement had been reached.

Not only did Nixon and Fitzgerald fail to inform the Court that a monetary settlement had been reached, they also did not state that their case would never go forward no matter what is the ultimate decision of this Court. Nixon may argue that the fact that a $26,000 wager exists

on the Court's ruling on the issue of absolute immunity means that a live controversy still exists. If that is true, however, he surely would have advised the Court of the existence of a settlement.

Instead, he has used this Court to manuever so as to not have to address serious allegations of Constitutional violations raised in Clark and other cases. Having lost in virtually every court that has considered his claim of absolute immunity, Nixon now seeks to redefine the jurisdiction granted to this court by the U.S. Constitution.

CONCLUSION

For all the reasons set forth above, the Clark plaintiffs respectfully move this court to dismiss the writ as improvidently granted. Should this Court proceed with consideration of this matter,

however, the Clark plaintiffs seek leave to intervene on the merits.

Respectfully submitted,

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